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Attorneys for Defendants William D. Gore and Alfred Joshua, M.D., Director of the San Diego County Sheriff's Department's Medical Services Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JAMES MICHAEL WILLIAMS,)	No. 15-CV-0654-AJB (PCL)
Plaintiff,)	
v.)	REPLY TO PLAINTIFF'S OBJECTION
)	TO REPORT AND
)	RECOMMENDATION GRANTING
WILLIAM D. GORE, SHERIFF OF SAN)	DEFENDANTS' MOTION FOR
DIEGO COUNTY AND JOHN OR JANE)	SUMMARY JUDGMENT ON
DOE, MEDICAL DIRECTOR OF SAN)	EXHAUSTION GROUNDS
DIEGO COUNTY JAIL FACILITIES,)	
Defendants.)	[DOC. NOS. 74 & 78]

Defendants, William D. Gore and Alfred Joshua, M.D., hereby submit their reply to Plaintiff's Objection to the Report and Recommendation Granting Defendants' Motion for Summary Judgment. Plaintiff failed to meet his burden of showing that he exhausted his administrative remedies and Defendants respectfully request that the Court adopt the Report and Recommendation.

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1 Plaintiff admitted in his verified complaint that he did not exhaust the jail's
 2 grievance procedure. *See* ECF No. 1, Complaint at p. 6; *McElyea v. Babbitt*, 833 F.2d
 3 196, 197-98 & n.1 (9th Cir. 1987).¹ Plaintiff claimed there was no viable option to do so
 4 because his verbal requests, Scripps records, and the Superior Court's notations in the
 5 criminal in the Preliminary Examination Minutes and Felony Predisposition Minutes
 6 from his criminal case that suggested he be referred to a medical unit while incarcerated,
 7 provided Defendants with "the benefit" of "sufficient notice." *Id.* at pp. 6, 15, & 16. The
 8 Complaint does not contend that Plaintiff submitted six separate grievances written
 9 grievances in the lock box when alleging he exhausted his administrative remedies. *Id.* at
 10 p. 6. A "Plaintiff cannot create a triable issue of fact in order to defeat summary
 11 judgment by submitting a contradictory declaration." *Glass v. Scribner*, No. 1:04-cv-
 12 05953 AWI DLB PC, 2009 U.S. Dist. LEXIS 73481, at *35 (E.D. Cal. Aug. 19, 2009).

13 Plaintiff failed to file a declaration in support of his opposition to the motion for
 14 summary judgment setting forth facts indicating he submitted written grievances to the
 15 lockbox that were ignored. (Doc. No. 74 Report & Recommendation at 7:17 – 8:3.) Nor
 16 did he incorporate by reference the declaration he filed in opposition to the original
 17 motion for summary judgment. Fed. Rules Civ.Proc., rule 56(c)(1)(A). It is improper to
 18 wait until *after* the Court has issued its Report and Recommendation denying his motion
 19 for summary judgment to file a declaration setting forth factual details regarding his
 20 alleged exhaustion. *Id.* "Pro se litigants must follow the same rules of procedure that
 21 govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Even if the
 22 Court were to construe Plaintiff's declaration attached to his opposition to the report and
 23 recommendation as a motion for reconsideration under Rule 60, Plaintiff's statements of
 24 fact in the declaration do not constitute newly discovered evidence that would warrant
 25 reconsideration. Fed. Rules Civ.Proc., rule 60.

27 ¹ Even if the allegations in Plaintiff's complaint had *not* been verified under penalty of
 28 perjury [Doc. No. 1 at p. 7], statements in a complaint are judicial admissions. *See* Fed.
 R. Evid. 801(d)(2); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir.
 1988).

1 Accordingly, Defendants respectfully request that the Court adopt the Report and
2 Recommendation. In the event the Court determines Plaintiff has created a triable issue
3 of material fact as to whether he exhausted his administrative remedies, Defendants
4 respectfully request that the Court hold an evidentiary hearing to resolve any disputed
5 facts regarding exhaustion before denying the motion for summary judgment or
6 addressing Plaintiff's claims on the merits. *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir.
7 2014).

8 Respectfully submitted,

9 DATED: March 24, 2017

THOMAS E. MONTGOMERY, County Counsel

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11 By: s/MELISSA M. HOLMES, Senior Deputy
12 Attorneys for Defendants William D. Gore and
13 Alfred Joshua, M.D.
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DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On March 24, 2017, I served the following documents:


**REPLY TO PLAINTIFF'S OBJECTION TO REPORT AND
RECOMMENDATION GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON EXHAUSTION GROUNDS
[DOC. NOS. 74 & 78]**

In the following manner:

- ☒ **(BY MAIL)** By causing a true copy thereof, enclosed in a sealed envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

James M. Williams
#AN9579
480 Alta Rd.
San Diego, CA 92179

Executed on March 24, 2017, at San Diego, California:

By: 
MELISSA M. HOLMES